

NO. 43687-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Matter of:

DAGMAR Q. KNIGHT,

A vulnerable adult/Appellant,

Tor K. Knight,

Appellant,

v.

Eric Knight,

Respondent.

APPELLANT DAGMAR KNIGHT'S OPENING BRIEF

JOAN K. MELL, WSBA #21319
Attorneys for Appellant Dagmar Knight
III BRANCHES LAW, PLLC
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643

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I. INTRODUCTION

Dagmar Knight seeks reversal of the trial court's determination that she is a "vulnerable adult" in need of court ordered restraints. She objects in particular to the interference with the love and support she gives her younger son Tor Knight. She takes issue with the court empowering her older son, Eric, to the detriment of her younger son, Tor, who is disabled and has cognitive limitations. She wants the vulnerable adult protection order dismissed and the restraints against Tor lifted so that she may continue to care for him as she has done for years, even if this means her son Eric does not get the exclusive control over the family waterfront estate and other assets that he desires.

II. ASSIGNMENTS OF ERROR

- A. The trial court erred in violation of Dagmar Knight's due process rights when it recognized Eric Knight's petition for a protective order without clear, cogent, and convincing evidence that Dagmar Knight was a "vulnerable adult" or that Eric Knight was an "interested person."
1. Is clear, cogent, and convincing evidence required for purposes of due process?
 2. Is Dagmar Knight a "vulnerable adult"?
 - a. Does Dagmar Knight have a functional, mental, or physical inability to care for herself supported by objective medical evidence?
 - b. Does Dagmar Knight have a personal caregiver?

3. Is Eric Knight an “interested person”?
 - a. Did Eric Knight have a good faith belief that court intervention was needed under the Act?
 - b. Did Eric Knight establish by clear, cogent, and convincing evidence that Dagmar Knight was not able to protect her own interests?
- B. The trial court erred when it imposed the most restrictive restraints upon his mother over her objections.
 1. Did the trial court fail to consider the needs of Dagmar Knight to nurture her son?
 2. Did the trial court fail to consider the merits of a shorter term order?
- C. Should Dagmar Knight recover her attorney’s fees and costs on appeal?

III. STATEMENT OF THE CASE

Dagmar Knight, a graduate of Tacoma’s Annie Wright Seminary, married Wayne Knight in 1952. Wayne Knight was a local Tacoma attorney who passed in 2010. CP 27. Dagmar was a librarian. They had two sons Tor Knight (48) and Eric Knight (58). They raised them in their home on the family estate named Lillegard, where Dagmar still resides. CP 384. Their sons have both struggled with drug use and runs ins with the law. Id. Neither brother gets along well with the other, nor have they for over twenty years. Id. Tor Knight is disabled and has cognitive challenges. Id.

Wayne and Dagmar Knight did well financially, providing security for the family. They established a trust asset worth approximately four million dollars that is managed by a professional trustee, Wells Fargo Bank. *Id.* A large portion of this trust is the twenty-six acres of the family's waterfront property. Prior to any restraints, Tor resided in his separate home at Lillegard that is owned by the trust. Eric has his own personal property in Purdy.

In his will, Wayne Knight expressly provided that his son Tor receive support and maintenance. Dagmar Knight feels the same about providing for Tor. She knows Tor requires more of her support both emotionally and financially than Eric and she wants to continue to provide and care for him. CP 384. She has done so for years as her son has been in and out of the criminal justice system to include incarceration. CP 385. Eric has had similar problems. *Id.* Unfortunately, there is animosity between the sons and resentment by Eric that he does not have exclusive access to and use of money or the attractive waterfront acreage held in trust, and because his brother is unseemly and still gets supported. CP 291, 296-297, 305 - 307. Eric Knight is pursuing his interests in court. Dagmar believes he is not acting in good faith, nor in her best interests. CP 384 and 370. His control of the assets is the subject matter of this litigation and a guardianship proceeding he filed at the same time.

On March 8th, 2012, Eric Knight presented his petition for a protective order for Dagmar against his brother Tor. CP 449. Both Dagmar and Tor appeared through counsel to contest the petition. RP 2 March 8th, 2012. The commissioner who heard the motion dismissed the petition because he found it insufficient and unnecessary to protect Dagmar. RP 48 - 50 March 8th, 2012. , CP 316. He noted he had declarations that “say completely different things.” Id. at 48. He specifically pointed out a report from Dr. Eisenhower filed in the guardianship action making favorable statements about Dagmar Knight’s status and cognitive abilities. Id. Eric did not file any medical reports to declaring his mother to have any mental, physical, or functional limitations in support of his vulnerable adult petition.

The commissioner commented the dispute appeared to him to be about the brothers. Id. He queried counsel about Eric’s efforts to control his mother, specifically his unilateral decision to change her phone number and ban all incoming telephone calls to her. CP 47 March 8th, 2012. Eric justified his actions, claiming the “caregiver” he moved into his mother’s home was reporting to him that “sundry” people were calling his mother. Id. Dagmar did not consent to this restriction on her ability to speak to whomever she chose. Her GAL from the guardianship action had the commissioner enter an order in the guardianship action restraining Eric

and Tor from socially alienating their mother by their conduct or attempts to influence her. CP 390.

Eric was not satisfied with proceeding just on the guardianship matter. He moved to revise the dismissal of his petition for a protective order. On June 15th, 2012, the trial court heard Eric's motion for revision and granted him relief. CP 449. The court entered a vulnerable adult protection order with all of the restraints Eric requested. CP 439 - 442. The court imposed these restraints without a fact finding hearing to assess the credibility of the witnesses' testimony. RP 59 - 61 June 15th, 2012. Eric did not offer any professional or expert testimony on revision. The only professional testimony heard by the court was Dr. Donley's opinion that the court's order to remove Tor from his home and separate him from his mother presented a risk of suicide, likely by the police who were expected to serve Tor and remove him from his home. CP 426-427. Dr. Donley is Tor's psychiatrist who has worked with Tor and Dagmar for years. He understands the symbiotic relationship between mother and son. CP 425. An abrupt separation of the two against their wishes was potentially fatal. CP 421.

The court imposed restraints forced Tor out of his home because his home is situated on the 26 acres of the estate within 1000 feet of his mother's home. CP 440. The order bans Tor from his home and the

family home and the entire family estate. CP 440. All of Dagmar's daily contact with her son was initially restrained, but was later revised to allow for limited supervision controlled by the GAL who arranged for visitation off the estate in a family friend's home. CP 394, 441. The restrictions forced Dagmar to stop paying her son's bills, which she had done consistently for years. CP 440. The court imposed these restraints for the maximum term possible under the Act. RCW 74.34.130. The restraints remain in effect for five years. CP 439.

In an effort to obtain relief from the restraints Dagmar finds unreasonable, she moved for reconsideration. CP 449. The trial court denied her any relief. CP 450. She now seeks appellate level review of the orders entered in this action. CP 445.

IV. ARGUMENT

A. Standard of Review

The applicable standard of review of a protective order entered on the record without a fact-finding hearing is *de novo*. *In re Marriage of R.E.*, 144 Wn. App. 393, 183 P.3d 339 (2008). *In re Marriage of Dodd*, 120 Wn. App. 638, 86 P.3d 801 (2004). A *de novo* review of the record shows the trial court erred in failing to find clear, cogent, and convincing evidence that Dagmar Knight was a "vulnerable adult" or that her son Eric was an "interested party" for purposes of imposing five year restraints.

The court substantially disrupted the status quo, causing irreparable harm to Dagmar Knight the eighty-one year old family matriarch whose happiness depends upon the well being of her children and family.

B. Eric Knight Failed To Offer Clear, Cogent, and Convincing Evidence In Support of His Petition.

Eric Knight carries the burden of proving specific facts and circumstances, which demonstrate the need for the relief sought. RCW 74.34.110. Eric Knight fails to meet his burden because he did not offer clear, cogent, and convincing evidence to warrant relief. The court commissioner correctly dismissed his petition and the trial court erred when it reversed the commissioner's ruling.

1. Due Process Standards Require Clear, Cogent, and Convincing Proof When Restraining A Person's Life, Liberty, and Property Interests.

Due process is a fundamental right protected under the federal and state constitutions. U.S. CONST. amends. V, XIV § 1 and WASH. CONST. art. I § 3. Due process confers both procedural and substantive protections from deprivation of life, liberty, and property interests. *Ammunrud v. Board of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006). Life, liberty, and property interests include the life, liberty, and property interests of Dagmar Knight impaired by the protective order.

Washington's Supreme Court recognizes the standard of proof

requirements under a due process analysis. *Hardee v. State Department of Social and Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011). The standard of proof instructs the fact finder concerning the degree of confidence our society thinks the fact finder should have in the correctness of factual conclusions for a particular type of adjudication. *Id.* at 8. The *Hardee* decision holds that a child care licensee is not afforded the due process protection of a clear, cogent, and convincing standard of proof when subjected to license revocation. The court reasons that a child care license is not a professional license, and only professional licenses such as that earned by doctors creates a protected property interest for which revocation requires due process. In *Hardee*, the court engaged in the due process analysis despite a clear Legislative expression that the lesser standard applies to the property interest at issue. *Id.* at 5, RCW 43.215.300. While affirming the express Legislative standard for child care licensees, the court did not disrupt its previous decision that the higher standard still applies when the interests at stake are protected property interests like doctors have in their licenses. *Nguyen v. State, Dept. of Health*, 144 Wn.2d 516, 29 P.3d 689 (2009).

Here, the Legislature did not articulate the applicable standard of proof in a vulnerable adult action under RCW 74.34.080 nor RCW 74.34.110 & 120. Thus, there is no clear expression that a lesser standard

is sufficient. A lesser standard is not sufficient to obtain a protective order because a protective order necessarily interferes with the protected life, liberty, and property interests of the vulnerable adult and the respondent. Unlike in *Hardee*, the rights Mrs. Knight asserts are not permissive rights, such as a license, afforded her through agency action. Mrs. Knight contests the restraints on her parent child relationship, her money, and her home.

Eric Knight petitioned for restraints on his brother's relationship with his mother, both personally and financially. CP 29 and 30. Eric obtained an order preventing Dagmar Knight from unauthorized contact with her son for five years. He also obtained an order forcing her disabled son out of his home and off the entire twenty-six acre family estate causing him to become homeless. CP 364. The orders further restrained Dagmar's ability to provide Tor financial or other support without the court considering her expenditures or allocations of her resources on him a violation by him of the court order. The order subjected all of her spending on Tor to an accounting. These restraints were imposed without making any arrangements to care for and nurture her disabled and dependent son. Thus, the restraints ordered against her disabled son equate to restraints on her life, liberty, and property interests. Thus, Eric has the burden of proving the need for such restraints by clear, cogent, and

convincing evidence. Eric Knight did not meet his burden and the court commissioner recognized it when he dismissed his petition. The trial judge should not have reversed his decision.

a. Interference with Parent-Child Relationship

The liberty and privacy protections of the due process clause establish a parental right to the care, custody, and companionship of a child. *In re Sumey*, 94 Wn.2d 757, 621 P.2d 108 (1980). The parent-child relationship is a “sacred right”, described by the courts as “more precious...than the right of life itself.” *In re Myricks*, 85 Wn.2d 252, 253-254, 533 P.2d 841 (1975). This right is not extinguished when the child reaches the age of majority, particularly where the adult child is disabled and dependent upon a parent. *See*, RCW 4.20.060. And as in this case, where the parent depends upon the adult child for transportation and other valuable services of the adult child. *Armantrout v. Carlson*, 166 Wn.2d 931, 214 P.3d 914 (2009).

Dagmar Knight objects to any restraints on her contacts with her son. CP 237 and CP 383 - 385. She has suffered emotionally from the destruction of her parent child relationship. CP 237. The protective order interferes with her rights without clear, cogent, and convincing evidence that she requires protection from her son. The record lacks any evidence of any physical harm to Dee Knight from her son Tor. She loves him and

wants to care for him, and she had been doing so for years before Eric interfered. Due process protects her rights to do so.

b. Interference with Dagmar Knight's Earnings

A person has a substantial property interest in accessing and spending the person's own money in the person's own bank account. RCW 30.22.090. A person has a substantial property interest in the person's money where ever the money is kept. *City of Des Moines v. Personal Property Identified as \$81,231 in U.S. Currency*, 87 Wn. App. 689, 943 P.2d 669 (1997). Here Dagmar Knight has supported Tor Knight essentially his entire adult life. Her husband ensured she could continue to support their son even after his death by making specific provisions in his estate documents to provide for Tor. CP 154.

The orders entered in this matter restrained Dagmar Knight from supporting her son from her own earnings. Due process protects her from such restraint absent a compelling interest in such restraints established by clear, cogent, and convincing evidence. The requisite evidence does not exist.

c. Interference with Dagmar Knight's Home

Interference with the fundamental attributes of property ownership implicates due process protections. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P. 2d 765 (1992). Unduly oppressive restraints do not

achieve any legitimate public purpose. *Id.*

Dagmar Knight resides in the home where she raised her two sons. A restraint that prohibits one of her two sons from coming into her home is unduly oppressive and interferes with her substantial property interests in her own home. The basis of any restraint on how she uses her own home requires proof by clear, cogent, and convincing evidence to comport with her constitutionally protected due process interests. Eric Knight never offered sufficient evidence to warrant his requested restraints.

2. The Court Had No Power To Restrain Dagmar Knight Because She Was Not A “Vulnerable Adult.”

The Legislature created the Abuse of Vulnerable Adults Act, chapter 74.34 RCW, to provide protection and legal remedies to vulnerable adults living in the community, but dependent on others for their care. The Legislature relied upon seven separate criteria to characterize the kind of person the court can protect under the Act. RCW 74.34.020(17). Eric relies upon two of these criteria to support his petition. CP 26. First, he represents that his mother is over sixty years old and does not have the functional, mental, or physical ability to care for herself. CP 26. Second, he represents that his mother is receiving services from a compensated personal aide who provides health care services for his “functionally disabled” mother at her direction. CP 26. Eric Knight clouds the question

of his mother's independence and capacity with a fear invoking account of his brother Tor's character to get a remedy under the Act before he must prove his mother's incapacity in the guardianship proceedings. Eric never meets his burden of showing his mother's inability to live independently, but rather uses the restraints of the protective order to isolate his mother from his competition. As to the second criteria he invoked, Eric Knight fails to meet his statutory burden because his mother never received health care services for any functional disability from a recognized health care provider.

a. Prior to Any Restraint Dagmar Knight Lived Independently and Cared for Herself

A person over age sixty who has the "functional, mental, or physical inability to care for herself" may be considered a "vulnerable adult." RCW 74.34.020(17)(a). This is a distinct category from a finding of incapacity under the guardianship statutes. RCW 74.34.020(17)(b). The Act does not define a "functional, mental, or physical inability to care for" oneself.

Case law provides some guidance as to the sufficiency of a mental inability to impose court ordered restraints. The courts have found that mental illness alone is not constitutionally adequate for a court to confine a person against her will. *In re LaBelle*, 107 Wn. 2d 196, 726 P.2d 138

(1986). A non-dangerous individual who is capable of surviving safely in freedom by herself with the help of willing and responsible family members or friends cannot be confined against her will. *Id.* at 201. This description presupposes a person actually has a mental illness.

Here, the record does not evidence any mental impairment suffered by Dagmar. Eric does not offer any psychological testimony describing any cognitive dysfunction. He does not offer any psychological assessments that would evidence cognitive limitations. His subjective impressions and the subjective impressions of the family and friends whom he had submit declarations prepared by his attorney are not sufficient. They are self-serving and they do not show Dagmar Knight is not capable of surviving safely with their help. She is and she has been.

Interestingly, the Legislature separated the criteria of “functional, mental, and physical inability to care for” oneself as an independent category from a determination of incapacity under the guardianship statutes without setting forth the criteria to be used by the court to make this distinct determination. Recognizing the two are distinct as indicated by the Legislature’s separation of the two, separate standards for proving the elements should apply. For a protection order that is an expedited hearing process without the same due process protections of a guardianship proceeding, a petitioner should have to prove a “functional,

mental, and physical inability to care for” oneself with clear, cogent, and convincing expert testimony.¹ This added due process would distinguish the standards under a guardianship proceeding from the distinct standard in the vulnerable adult definition. A determination of incapacity based upon an inability to care for oneself under RCW 11.88.010(1)(c) is a legal and not a medical decision. *Endicott v. Saul*, 142 Wn. App. 899, 176 P.3d 560 (2008). In a guardianship proceeding, the court considers the management insufficiencies over time in the area of a person or estate. In a vulnerable adult proceeding, more should be required particularly when the alleged vulnerable adult is objecting to the petition. Without objective evidence from a medical professional who is bound by his or her own licensing standards to act professionally and in the best interests of the patient, a person who can function may be considered dysfunctional solely by the representations of family and friends who will benefit from court ordered restraints on the person. That is the case here where there is no expert testimony of incapacity that the court relied upon.²

When Eric Knight filed his petition, his mother was eighty-one years old. CP 27. He filed at the same time a guardianship action. RP 8. His

¹ Unlike guardianship proceedings, an alleged vulnerable adult does not have an express statutory entitlement to representation. *See*, RCW 11.88.045(1)(a).

² Eric Knight attempted to offer additional testimony to contravene Dagmar Knight’s declaration on reconsideration to include the testimony of the GAL from the guardianship action, which the trial court then “clarified” it did not rely upon at Eric Knight’s request. CP 449.

mother has not been found incompetent. Throughout the vulnerable adult proceedings, there never was a fact-finding hearing. Dagmar Knight should have been presumed to have sufficient capacity to make her own decisions. The law presumes that a person has legal capacity until proof to the contrary is established in a court of law. See, e.g. *Tai Vinh Vo v. Le Ngoc Pham*, 81 Wn. App. 781, 784, 916 P.2d 462 (1996). A person may not be found incapacitated over their objections without an evidentiary hearing on the issue of capacity. *Graham v. Graham*, 40 Wn.2d 64, 68, 240 P.2d 564 (1952). The record has reliable evidence of Dagmar Knight's competence. CP 234, 383-385. It also had reliable evidence that Tor was not a threat to her from non-family members. CP 115, CP 118 - 119.

Dagmar Knight's husband predeceased her and left her well protected financially through the appointment of a professional trust company to manage the majority of her assets. CP 27, 72-73.³ For all other matters, Eric Knight was designated as their attorney-in-fact in durable powers of attorney created in 2007, years before his father passed. CP 27. His father never invoked it, and the record does not state that

³ Eric Knight does not like the limitations of the trust that restrains his use of the resources as heir to his parents' estate. The trust conditions Eric's access to any money upon proof that he is sober and drug free. CP 78, CP 150. Eric is upset at Tor accessing and spending more than he earns, even though Tor has similar restraints on his access to trust funds. CP 82. The record shows both sons competing for the same inheritance.

Dagmar ever invoked it either. CP 74. In fact, just the opposite, she expressly revoked it when she learned Eric was purporting to use it on her behalf while she still had the capacity to make her own decisions. CP 114, 234. Even though his mother had yet to empower him, Eric represented to the court in his petition that he was his mother's guardian or legal fiduciary when he was not. CP 84.

Eric discusses hiring "caregivers" for his mother in February of 2011, following a cancer operation for a couple months. Apparently at that time he "wrote checks to pay her bills." CP 74. Ultimately, he added his name to her checking account so he could monitor the account after learning she was spending money on Tor. CP 75. At all other times, his mother cares for herself to include canceling her credit card, paying for her other son's living expenses,⁴ meeting with counsel at her home, paying for vet bills for a dog injured in her driveway, going to lunch and coffee with friends, and scheduling appointments with the trustee. CP 67-68, 75, 77, 89. Dagmar Knight has been living independently in the same house she has lived in on four hundred feet of low bank waterfront since 1959. CP 73. She is not receiving in home care to get her up, dressed, bathed, fed, etc. She has been as Eric describes running her own life because Eric has a life of his own. CP 78. She has always been competent to manage

⁴ Wayne Knight specifically provided for the care of Tor in his will. CP 114, CP 131.

her own affairs with some assistance from loved ones. CP 78. The court had no basis to find her “vulnerable.” The petition and order should be dismissed.

b. Dagmar Knight Was Not Receiving Health Care Services For Any Functional Disability

A “vulnerable adult” includes a person who “self-directs” her own care and “receives services from a personal aide under chapter 74.39 RCW.” RCW 74.34.020(17)(g). A personal aide is a credentialed health care provider who is hired by a person with a functional disability to provide the person health care in the person’s home. RCW 74.39.007 (2). When the Department of Social and Health Services provides a registered personal aide, the personal aide is exempt from obtaining credentials with the Department of Health for the provision of health care services to the functionally disabled person. *Id.* and RCW 74.39.060 & .070. If a personal aide is purely private, the personal aide must have credentials to provide the requisite health care services. RCW 18.135, RCW 18.88A, RCW 18.88B. The individual must communicate her intent to initiate self-directed care by informing the health care professional who has ordered the treatment. RCW 74.39.050. A licensed health care provider must then order the treatment and ascertain that the personal aide is capable of providing the health care tasks and understands the health care

tasks to be performed. RCW 74.39.050(d). Health care tasks are those medical, nursing, or home health services that enable the person to maintain independence, personal hygiene, and safety in her home. RCW 74.39.050.

Dagmar Knight never hired a personal aide. Eric Knight makes no mention of a personal aide in his declaration in support of his petition. He says he hired a number of “caregivers” to stay with her for a couple months when Tor was not caring for her the way he wanted. CP 74. Dagmar and Tor contend he positioned people in the home who could report to him. Regardless, a caregiver hired by her son and working at his direction does not qualify as personal aides under the statute. The record does not include any declaration from either a physician or personal aide with the requisite credentials to qualify Dagmar as a vulnerable adult. Thus, Dagmar Knight does not qualify as a “vulnerable adult” under the personal aide criteria of the definition of “vulnerable adult.” RCW 74.34.020(17). Eric Knight failed to meet his burden of proving his mother was a “vulnerable adult” under the Act. The trial court lacked the requisite statutory authority to enter a vulnerable adult protection order at Eric’s request and over Dagmar’s objections. The petition and order should be dismissed.

C. Eric Knight Was Not An “Interested Person”

The Legislature defines an “interested person” somewhat narrowly.

The person must establish multiple criteria:

(10) "Interested person" means a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests. RCW 74.34.020(10).

A petitioner must file a declaration under penalty of perjury that includes a statement why the petitioner qualifies as an interested person. Eric Knight’s declaration fails to establish the necessary criteria to show by clear, cogent, and convincing evidence that he is an “interested person.”

1. Eric Knight Lacks A Good Faith Belief Court Intervention Is Needed

Eric Knight checked the box on his petition that states in preprinted form the statutory content requiring that he had a good faith belief that the court’s intervention was necessary. CP 27. However, Eric does not describe any facts that would reasonably support a good faith belief that his mother needs a protective order against her son. Instead, the facts set forth in his declaration primarily express his concern about Tor depleting the assets that he wants to enjoy. CP 27 – 28. The court commissioner recognized that the action appeared to be about a dispute between the

brothers, rather than a proper use of the vulnerable adult act. RP 48, March 8th, 2012. The court commissioner recognized the guardianship proceeding would be sufficient to protect Dagmar Knight, if she was found to actually be incompetent or incapacitated. *Id.*

Good faith is traditionally measured by an objective standard. *Huff v. Budbill*, 141 Wn.2d 1, 1 P.3d 1138 (2000); *State v. Ager*, 128 Wn.2d 85, 904 P.2d 715 (1995). The subjective belief must be reasonable under the circumstances. *Huff* at 10. There must be some legal or factual basis that exists to support a finding of good faith. Here, the trust controlled the majority of the assets and was actively managing those resources. Dagmar had limited funds in her bank account that Eric could access. Her bank and Eric appeared to be openly communicating, as he had no trouble producing bank records to support his petition. In fact, it is his review of the records that appear to have precipitated his pursuit of a protection order. He resented the money his mother was spending on his brother. It was more money than he was making. Eric does not explain any effort he made to allow his mother to designate someone to help her with the bills or to hire someone to help her pay her bills. In fact, he explains she was paying her bills and Tor's bills too. Eric sought and obtained the appointment of a guardian ad litem for his mother in the guardianship action. Eric failed to explain how he required more protection than the

GAL could provide. Thus, Eric Knight did not show legally nor factually that he required court intervention in addition to the intervention available through the guardianship action. Eric Knight should not be permitted to do an end run around the due process protections afforded his mother in a guardianship proceeding though a vulnerable adult action designed to destroy his brother, which has also caused his mother's condition to deteriorate. Eric Knight is the only person to benefit from the vulnerable adult action to date. He has not acted in good faith. If he was acting in good faith he would have made arrangements to allow his mother to decide who she wants managing her money and her personal affairs to include the acceptance of professionals other than her two sons. Instead, he insists he has her power of attorney over her objections. Eric Knight has failed to meet his burden of showing by clear, cogent, and convincing evidence that he is an interested person. His petition and the subsequent order should be dismissed.

2. Eric Knight Fails To Show Dagmar Knight Was Not Able To Protect Her Own Interests

The most apparent evidence that Eric is not an interested party is the absence of any documentation from him about what his mother thinks or wants. He fails to show that he spends time with his mother for any reason other than to control her spending. He does not provide any

evidence that he spends time with her just to enjoy her. He does not provide any evidence that he spends any time with her taking her to appointments or bringing her to his house for dinner. He does not provide any evidence that he understands how much she loves and wants to care for her son Tor even though Tor suffers from mental illness and other dependencies. He makes no offer of proof about the things that matter to her and he fails to show how she is unable to protect those things that matter to her.

Eric Knight's evidence focuses primarily on the choices she makes to spend money on Tor. He also offers a lot of evidence about Tor's character. Eric finds his mother's support and love for Tor irrational, but offers no explanation as to why his mother would find this irrational. His mother may spend all of her discretionary money on Tor if she chooses. She has the absolute right to defend his actions. The fact that she is doing so is not evidence that she is unable to protect her own interests. She has a managed trust account to ensure she is well supported. Her discretionary money is just that. It is discretionary money to spend as she chooses. No one has the power to substitute Eric's decision making for her decision making, not even the GAL in the guardianship proceeding unless she lacks the capacity to consent. Unlike Eric in his petition, a GAL always reports the express wishes of his ward in his report to the court. Here Eric Knight

makes no such showing and he cannot make the requisite showing because his mother does not want the petition. The record offered by Dagmar Knight is clear in this action. CP 364 - 366. Dagmar Knight does not want any restraints on her ability to have contact with and care for her son Tor to include spending her own money to support him. There is no evidence in the record that she has suffered any more than any mother would suffer who has a son with mental problems. The fact that she chooses to support a son who is disreputable does not mean she is irrational; it means she is a loving and nurturing parent.

Eric Knight has not met his burden of showing he is an interested person under the statute. He has shown only that he is a residuary beneficiary of his family assets, which he is aggressively seeking to protect for his own benefit. His petition and order should be dismissed and his interests asserted in the guardianship proceeding. A protective order in this action does nothing to ensure his mother's well being, and in fact the process has been abused to such a degree that she is suffering irreparable destruction of her rights as a parent and loving mother. If she cannot parent, she cannot be who she is.

D. The Court Imposed The Most Restrictive Restraints, Ignoring Less Restrictive Alternatives

The Abuse of Vulnerable Adults Act expresses the Legislature's

intent that vulnerable adults receive protective services in the least restrictive environment appropriate and available to the vulnerable adult. RCW 74.34.005. In cases where the vulnerable adult objects to entry of any restraints and the court finds it necessary to order protections, the court shall craft an order that is the least restrictive. RCW 74.34.135.

1. No Contact and No Money Is An Unreasonably Restrictive Restraint

The court entered an order so restrictive that Tor had to leave his home and live in his car. His mother could have no contact with him when she was accustomed to interacting with him on a daily basis. A less restrictive restraint that would have reduced the trauma associated with Tor's homelessness would have been to restrain Tor from entering his mother's home without supervision. Instead the court banished him from her home, his home, and the estate. This is their entire universe. The issue never properly addressed by the court was the impact of such restraints on Tor's mental status. The court failed to consider and recognize that such a dramatic shift would precipitate instability and heightened irrational thinking in Tor; thus inciting a risk of harm, rather than reducing it. The court failed to provide a maternal substitute for Tor for his sake and for his mother's sake.

Tor was also restrained from using her money. The record is clear that Tor is dependent upon his mother. His mother has consistently

provided him monetary support. His mother should have been provided the opportunity to continue to nurture her son and provide for his care. If she was allowed to continue expending a reasonable sum on the support of Tor, she could have arranged to set him up in an apartment or other residential care so that he would not have been homeless, and she would know he was safe. None of the intense suffering Dagmar Knight has endured worrying about her dependent son has been necessary to protect her from him. The unreasonable restraints should be abandoned and dismissed with the petition.

2. A Five Year Restraint Is An Unreasonably Restrictive Restraint

The court can in its discretion order temporary relief. This case presented facts that justify entry of a temporary order rather than the longest term order possible. The facts in support of temporary relief include the fact that the guardianship proceeding had yet to reach trial. A short term order to be revisited and reconciled with the findings of the court in the guardianship proceeding would be efficient, avoiding the expenditure of judicial resources on a motion to set aside the order if inconsistent with the rulings of the court in the guardianship action. It would also provide the greatest due process protections for Dagmar and Tor.

A secondary consideration for temporary relief is whether Tor

presents a threat to his mother when he receives treatment and care. Addressing Tor's mental health needs rather than punishing him for them would be a far better outcome for everyone involved, including the courts and the county jail where the mental health services are limited and costly. A short term order designed to address Tor's needs would be supportive of Dagmar's parenting rights, rather than destructive. With treatment, Tor likely presents no risk of harm to himself or others. His mother has never feared him. What she fears is Eric destroying him. A five year order equates to a death sentence on their relationship. Dagmar Knight may not survive beyond five years. She is denied any opportunity for companionship with her son Tor for what may be the remainder of her life. She cannot see him in her own home where she raised him. If she falls ill, he cannot see her. The results in this case are directly inapposite to the policy objectives of the Act. The Act was designed to be compatible with this state's policy objectives expressed in the Long Term Care Service Options Act that promotes self determination and ensures the most independent living situation consistent with individual needs measured by functional ability. RCW 74.39 and RCW 74.24.005(6). The order imposed upon Dagmar Knight lacks any deference to her wishes or her abilities. The five year order should be dismissed.

E. Dagmar Knight Is Entitled To Attorney's Fees and Costs On Appeal

Dagmar Knight requests she be awarded her attorney's fees and costs on appeal against Eric Knight. She bases her request upon the attorney's fees and costs provisions of the vulnerable adult protections, which authorizes the court to order relief as it deems necessary for the protection of the vulnerable adult. RCW 74.34.130. She also relies upon equitable grounds articulated in the common law in bad faith actions. *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 982 P.2d 131 (1999). Dagmar Knight has suffered tremendously by the allegations Eric Knight sets forth in his petition and supporting declarations. She is in the middle of a war with her own family and friends. This proceeding has been devastating for her. Specifically, she takes offense at Eric's representation that she fears her son Tor. She does not. She is offended that Eric maintains she is incapacitated such that she cannot make her own decisions. She can. Finally, she believes Eric has misrepresented that he has her power of attorney when she revoked it and when she has the capacity to make her own decisions. She can appoint her own power-of-attorney. She wants Eric held accountable for pursuing this action against her will and using it to harm her disabled son Tor. An award of reasonable attorney's fees and costs would provide such relief and would

hold Eric accountable for his bad faith in asserting a power of attorney that his mother never authorized him to use.

V. CONCLUSION

The trial court unlawfully restrained Dagmar Knight over her objections when she has the capacity to act in her own best interests. Eric Knight her adversary and heir to her assets failed to show by clear, cogent, and convincing evidence that his mother is either “vulnerable”, or that he is an “interested person”. His interest is protecting her assets for his benefit. The court erroneously imposed the most restrictive restraints in violation of the policy objectives of the Abuse of Vulnerable Adults Act. This court is asked to reverse the trial court’s orders, dismiss the petition, and allow the issues to be addressed properly when there is a legal determination regarding the capacity of Dagmar Knight in the guardianship proceedings. Dagmar Knight requests an award of her reasonable attorney’s fees and costs on appeal.

Respectfully submitted this 20th day of December 2012.

III BRANCHES LAW, PLLC

/s/ Joan K. Mell
Joan K. Mell, WSBA #21319
Attorney for Dagmar Knight

Declaration of Service

I, Jonathan Tretheway, make the following declaration:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On December 20, 2012, I caused to be served true and correct copies of the foregoing: Mrs. Knight's Opening Brief, and this Declaration of Service by Electronic mail through the Washington State Court of Appeals Div. II filing system as follows:

Robin H. Balsam
609 Tacoma Ave. S
Tacoma, WA 98402
rob@balsamlaw.com
253-627-7605 ph.
253-572-0912 fx.

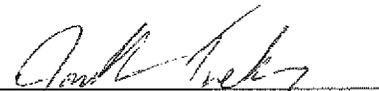
Michael Brian Smith
Attorney at Law
1901 65th Ave. W Ste. 200
Fircrest, WA 98466
holly@cpsps.com

John O'Melveny
15 N. Broadway # A
Tacoma, WA 98403
jomelveny@harboret.com
253-597-8979 ph.
253-627-4368 fx.

Judson Chantry Gray
The Gray Law Firm, P.S.
4142 6th Ave.
Tacoma, WA 98406
jgrayattorney@harboret.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 20th day of December 2012 at Fircrest, WA.


Jonathan Tretheway, Paralegal

III BRANCHES LAW

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rob@balsamlaw.com
jomelveny@harbornet.com
jgrayattorney@harbornet.com
holly@cdsps.com